

# **EXHIBIT A**

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

IN RE:

Chapter 11

W.R. Grace & Co., et al.,

Bankruptcy #01-01139 (JKF)

Debtor(s).

Wilmington, DE  
July 22, 2002  
9:56 A.M.

TRANSCRIPT OF MOTIONS HEARING  
BEFORE THE HONORABLE JUDITH K. FITZGERALD  
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For Debtor:

David W. Carickhoff, Jr., Esq.  
Pachuleki, Stang, Ziehl,  
Young & Jones  
919 North Market Street  
Wilmington, DE 19801

James W. Knapp, Esq.  
Kirkland & Ellis  
200 E. Randolph Drive  
Chicago, IL 60601

David Bernick, Esq.  
Kirkland & Ellis  
200 E. Randolph Drive  
Chicago, IL 60601

Janet S. Baer, Esq.  
Kirkland & Ellis  
200 E. Randolph Drive  
Chicago, IL 60601

Writer's Camp, Inc.  
Certified Court Transcribers  
432-329-0191

1 and an Order attached in advance.

2 MR. BERNICK: Right.

3 THE COURT: And 9 is --

4 MR. BERNICK: Is continued as well.

5 THE COURT: Because this will be the budget issue  
6 that we've worked --

7 MR. BERNICK: Right.

8 THE COURT: -- out.

9 MR. BERNICK: And by way of completeness, Your Honor,  
10 I suppose that what was formerly Item 4, which was our budget,  
11 also is continued.

12 THE COURT: Okay. All right. Thank you. Now I'm  
13 caught up.

14 MR. BERNICK: Okay. Now it brings us up to 10, and  
15 I'll let others speak to 10.

16 (Counsel confer)

17 MR. BERNICK: Your Honor, could I ask the Court's  
18 indulgence? If we could try to wind up matters that relate to  
19 the -- getting to the ZAI trial, then come back to the others?

20 THE COURT: That's fine.

21 MR. BERNICK: And that would require that we go to  
22 Item #13.

23 THE COURT: Okay.

24 MR. BERNICK: And with respect to Item #13, and I'll  
25 look forward to hearing from Mr. Westbrook on this, with

*Witter's Camp, Inc.*  
*Certified Court Transcribers*  
732-329-0791

1 respect to Item 13, the basic problem I think really has been  
2 long ago resolved. It's just a question of getting an Order  
3 entered that sets it down in writing. With the parties'  
4 concurrence. We've known since March that this is going to be  
5 a science trial. You said that in March, you said it in  
6 April, you said in May, you said it in June. And last month  
7 you entered an Order, the Order denying the claimants' Motion  
8 to Strike and scheduling certain matters in connection with  
9 the ZAI proofs of claim. That Order reiterated on no less  
10 than nine different occasions that what we were gonna have was  
11 a science trial. So one thing should be clear is that we're  
12 gonna have a science trial. That's what it's gonna be about.

13       The problem has been to get a schedule and a recital  
14 of the scope of discovery which really is tailored to that  
15 science trial. It's -- and we haven't been successful so far  
16 and we've been at it for over 3 months now. April 5, I wrote  
17 to propose a schedule and a scope of discovery, way back at  
18 the beginning, early part of April. On April 17, Mr. Sobel  
19 wrote back, raised only two issues, one was the timing of  
20 certain expert reports and the other was the scope of  
21 discovery issue. At the April 22nd hearing, after we got done  
22 with one of our debates about the overall approach, we talked  
23 specifically about these two matters, both those matters, that  
24 is, the timing of the expert reports and the scope of expert  
25 discovery, and I indicated that there was a desire on the part

*Writer's Cramp, Inc.*  
*Certified Court Transcribers*  
782-529-0191

1 of the claimants to deal not only with science, but also with  
2 other liability issues. And Your Honor commented at that time  
3 that you didn't see that that was necessary in light of the  
4 fact that we were going towards a science trial.

5 I was given the task of preparing an Order. That  
6 Order was prepared. And at the May hearing, we went over the  
7 Order, and the Order tracked the letter that I had written,  
8 precisely, accepted it, made the change on the timing of the  
9 expert reports, and the -- whether -- the Order also tracked  
10 the letter precisely in saying that discovery would be limited  
11 to matters that relate to whether ZAI creates an unreasonable  
12 risk of harm to occupants of these buildings.

13 At that hearing, there was some discussion  
14 specifically on the issue of the scope of discovery, and Mr.  
15 Sobel spoke to that matter and Your Honor suggested the  
16 deletion of certain language, where it said "two occupants,"  
17 that is harmed two occupants, so that we could deal with harm  
18 to potentially others. But with that one correction, it was  
19 still basically the same scope of discovery, that is, matters  
20 relating to whether there's an unreasonable risk of harm from  
21 ZAI.

22 I urged Your Honor at the May hearing to enter that  
23 Order so that we could get going, and Mr. Sobel urged the  
24 Court not to do that so that new counsel could be put in  
25 place. And for that reason, I believe that reason alone, the

*Walter's Cramp, Inc.*  
Certified Court Transcriber  
732-329-0197

1 entire matter has now been continued for 60 days till we're  
2 here today. But we're still wrestling with the same -- trying  
3 to get the same Order that we've been trying to deal with  
4 since May.

5       What has now happened? Well, they do have new  
6 counsel. Mr. Westbrook. And unfortunately at the meet and  
7 confer that took place, per Your Honor's instruction on this  
8 matter, it was old counsel, it was Mr. Sobel and others, who  
9 were all speaking to the issue once again and saying that they  
10 should not be limited in this proceeding or discovery to the  
11 science of ZAI. That was the position that they took. In an  
12 effort to compromise further, albeit still stay true to the  
13 spirit of what we're trying to accomplish, I agreed even to  
14 change the language of the Order so that we said, "discovery"  
15 -- "the scope of discovery will be limited to what science  
16 demonstrates with regard to whether ZAI creates a risk of  
17 harm," so that there wouldn't be any legal label in there, it  
18 would just be a subject matter. And with that one correction,  
19 we have now submitted, again, the Order to the Court that,  
20 again, has the same schedule as before, bumped off 60 more  
21 days at the Court's instruction, and also recites that the  
22 discovery should be limited to what's appropriate for a  
23 science trial, which are matters relating to what science has  
24 to say about the risk of ZAI.

25       So that is where we have finally come. They have

*Walter's Cramp, Inc.*

*Certified Court Transcribers*

*781-529-0197*

1 submitted an order that basically retrenches on these same  
2 issues all over again. They recite a litany of issues  
3 relating to (quote) "liability" that they want to pursue here,  
4 and they don't even want to be limited by that list. So you  
5 go through their proposed order. Sure it's risk, sure it's  
6 contamination, but it's whether there's property damage, it's  
7 whether there's impact on the value of the properties that are  
8 involved, it gets into remediation -- a whole series of other  
9 issues that are not the ZAI science issue. So once again,  
10 we're now talking about are we gonna have the ZAI science  
11 trial, or is it gonna be something that's different.

12 Their schedule also unilaterally moves the entire  
13 schedule back 90 days. Now, I had already moved it back 60  
14 days. They want 90 days on top of that. Your Honor, it is of  
15 critical importance, Your Honor, especially in light of the  
16 comments that have been made about whether this case is  
17 moving, this case must move on parallel tracks and this track  
18 is substantially, substantially delayed. We want to get to  
19 that trial. There's no reason we can't get to that trial  
20 promptly. Your Honor has said repeatedly what it's to be  
21 about, and this very order has now been before the Court,  
22 this'll be the third time, essentially, that these matters are  
23 before the Court.

24 THE COURT: Well --

25 MR. BERNICK: So we ask that the Court enter the

*Wetters's Stamp, Inc.*

*Certified Court Transcripts*

*757-559-0191*

1 Order that we've tendered.

2 THE COURT: I think I'm having a little bit of a --  
3 maybe it's a theoretical problem, but I agree that what I want  
4 to find out first is whether there is any scientific evidence  
5 that Zonolite caused some unreasonable risk of harm. Having  
6 -- and I think that's the floor. Because if there is no  
7 unreasonable risk of harm, then all of the damage issues don't  
8 need to be litigated.

9 MR. BERNICK: Correct.

10 THE COURT: So I don't want to get to damage issues  
11 now, because I don't think it's necessary to get to those  
12 issues --

13 MR. BERNICK: Right.

14 THE COURT: -- now. Unless you can't prove the  
15 unreasonable risk without also showing the damage. I -- most  
16 liability trials like this bifurcate the concept of liability  
17 from damage, and it seems to me we're looking at, in phase  
18 one, liability. But we're looking at only a subset of  
19 liability, which is whether the experts are going to be able  
20 to demonstrate that under any theory there is the possibility  
21 that Zonolite caused an unreasonable risk of harm. If the  
22 determination is yes, then I think the claimants have to prove  
23 under what theory the particular claimant suffers some harm,  
24 and then show damages. But don't we have to get to the issue  
25 first of whether there is an unreasonable risk of harm? I am

*Wetter's Cramp, Inc.*

*Certified Court Transcribers*

*752-329-0101*



1 looking for a narrow, focused trial on that subject matter.  
2 That's what I was attempting to get to.

3 Now, I don't know --

4 MR. BERNICK: Yeah. Our --

5 THE COURT: -- where the Debtor stands, I don't know  
6 where other Committee stands. That's what I thought would  
7 make a logical litigation strategy.

8 MR. BERNICK: That's where we've been ever since you  
9 suggested it in March. That's why we came up with the idea of  
10 having the claimants come before the Court to create, really,  
11 a real litigation basis for -- an arena for dealing with that  
12 issue, and in every single letter and Order that we've crafted  
13 in order to get a schedule put in place that defined what the  
14 discovery's to be about and what the schedule should be,  
15 that's exactly where we've been. Issues about what the  
16 particular legal standard might be in a particular state with  
17 respect to a particular individual will presumably (a), be  
18 relevant to whether you can certify any kind of class at all,  
19 but (b), be relevant when somebody actually files a claim.  
20 There'll be particular claims that'll be made under the laws  
21 of particular states.

22 What we're trying to isolate is a core body of  
23 evidence that will be informative to the Court on whether  
24 there really is a problem with this product, and further  
25 informative to the Court's decisions about how to deal with

*Walter's Cramp, Inc.*  
*Certified Court Transcribers*  
725-329-0191

1 it. Do you deal with it with -- through class? Do you deal  
2 with it through a notice and bar date program?

3 So all that we want to get to is enough of a generic  
4 description so that at least we're not pursuing discovery into  
5 historical matters or property value and damage matters.  
6 We're pursuing discovery that's focused on the science. And  
7 that's what we said in our letters and our orders ever since,  
8 and our order that we've tendered to the Court that's on the  
9 agenda says precisely that. "Discovery on what science  
10 demonstrates with regard to the risk of harm from ZAI."  
11 That's what it says. And on the schedule, same sequence, same  
12 dates, pushed back 60 days, consistent with exactly what Your  
13 Honor said last time.

14 THE COURT: Mr. Westbrook?

15 MR. WESTBROOK: Yes, Your Honor. Your Honor, I  
16 certainly agree that the focus should be on the science, but I  
17 think we need to keep our eye on the ball. This is not a fear  
18 of cancer claim. I know Grace wants to portray it as a quasi-  
19 personal injury type of claim.

20 We listed a number of issues in our proposed order  
21 and we certainly intended them as science issues, Your Honor,  
22 and just some examples. Can installation of ZAI contaminate  
23 properties with asbestos fibers? That's gonna require  
24 science. Can asbestos fibers be released during foreseeable  
25 use of the attic and other spaces over the lifetime of a

*Walter's Cramp, Inc.*

*Certified Court Transcription*  
732-329-0191

87

1 property with ZAI? Can asbestos fibers release during  
2 foreseeable use of ZAI settle on surfaces in the property  
3 causing contamination? Et cetera, et cetera. These are the  
4 issues that we see, Your Honor, need to be addressed. These  
5 are the issues for 15 or 20 years I have been addressing in  
6 traditional asbestos property damage claims, and for that same  
7 period of time, we have always butted heads with the  
8 defendant. They want to make it a personal injury -- quasi-  
9 personal injury case. It's not that. The building is the  
10 subject here. If the building is contaminated with asbestos  
11 fibers, the owner has a property damage claim.

12 Now, the owner may also have a fear of cancer claim,  
13 but we're not here to discuss that. The owner may also have  
14 some other claim. We're not here to discuss that. We need to  
15 keep our eye on the ball, because if we get off to what people  
16 fear about this and that, we are going to be a long way down  
17 the road and not get anything accomplished. If we keep our  
18 eye on the ball of the building, which the Courts have said  
19 that's the issue, and the contamination, we'll get there.

20 So, Your Honor, I don't think that -- I don't intend,  
21 certainly not intending to go into issues that are non-science  
22 issues. We certainly may have a disagreement with Grace about  
23 what the science should be. They're gonna want to focus on  
24 whether people are gonna get sick and drop dead like flies  
25 from this -- this situation. We're going to focus on are the

*Walter's Cramp, Inc.*  
Certified Court Transcribers  
722-329-0191

53

1 -- do the buildings have a problem.

2 The Court said back in April, April 22nd, that you  
3 were looking for a scientific basis for an injury of whatever  
4 nature. On March 18th, you said you want to find out if  
5 Zenolite is really creating some sort of a problem in a  
6 building. You said the litigation is essential, and we know  
7 that for the state to know how it's going to wrap up, and you  
8 said, you want to get liability on the hazardous nature of the  
9 product determined. Certainly, whether asbestos -- whether  
10 ZAI is innocuous or not is going to be an issue, but we need  
11 to focus on whether -- ZAI can release asbestos, whether  
12 that's a innocuous problem, whether it's a hazard, potential  
13 hazard, but we don't need to be talking about people's fears,  
14 about how many people are going to get sick from this or that.  
15 That's not the issue. The issue has got to be the building,  
16 and we're certainly willing to work with Grace on framing  
17 those issues, but I don't want to leave any impression today  
18 that the issue in this case from our standpoint should be  
19 anything other than whether these buildings have a  
20 contamination problem, now, or in the context of this  
21 bankruptcy, is such a problem inevitable?

22 THE COURT: Well, I mean, buildings can have a  
23 contamination problem without being damaged as a result of the  
24 contamination. If nobody -- if there is no damage as a result  
25 of the fact that the building is contaminated, the building

*Walter's Cramp, Inc.*  
*Certified Court Transcriber*  
*732-289-0197*

B4

1 itself doesn't suffer damage. If there is a risk that the  
2 building can't be resold because it's contaminated with  
3 something that a person views as a hazardous product, that's  
4 one thing, but the building itself doesn't have that claim. I  
5 think the claim is, and I think where you're going to go with  
6 this, is -- maybe I'm incorrect, so that's why I'm raising  
7 this issue to find out -- is if in fact Sonolite does release  
8 fibers, then the question is, are those fibers dangerous? And  
9 if they are, okay, then at some point you're probably going to  
10 have both property damage and personal injury claims. And I  
11 agree with you, we're not going there now. So the question  
12 is, can they release? But the second question is, so what if  
13 they can release? Is there a harm incident to that release?

14 So I don't know that I disagree with your list of  
15 issues. I'm not sure it's necessary for me to state them now.

16 MR. WESTROCK: I think, Your Honor, we're on the  
17 same wavelength.

18 THE COURT: Mr. Bernick?

19 MR. BERNICK: That's -- I -- I was gonna come to the  
20 same basic observation. Obviously, if there's contamination,  
21 you do get to the sequence of questions that we just focused  
22 on. But it's contamination, then, is there in fact an  
23 unreasonable risk of harm?

24 THE COURT: Right.

25 MR. BERNICK: Is it gonna be harmful or hazardous?

*Walter's Camp, Inc.*  
Certified Court Transcription  
732-520-0191

85

1 And if that's what we're focused on here, that's fine. That's  
2 what our Order seeks to pick up by saying what does science  
3 have to say about whether ZAI causes or is associated or has  
4 an unreasonable risk of harm. Obviously, in some of the  
5 circumstance where people are exposed to it, that's where you  
6 examine it. Their Order goes way beyond that. Their Order  
7 gets into impact on property values, whether homeowners and  
8 occupants are aware of the potential for asbestos  
9 contamination, what kind of remedial measures might be  
10 involved? That's where we fall off the wagon and say, nah,  
11 that gets into the question of under what kinds of  
12 circumstances may there be damages? But -- and it's not  
13 relevant at this point in time.

14 If what we're talking about here, again, is the  
15 properties, the product, whether there is contamination that's  
16 associated with it, and then the consequences of that  
17 contamination in terms of health risk or hazard, I think we're  
18 all reading off the same page, and I think that all of those  
19 are perfectly encompassed by the descriptor that we made  
20 deliberately broad in our proposed Order, which is what does  
21 science have to say?

22 THE COURT: Mr. Westbrook, why don't I try it with  
23 the general parameter the way the Debtor has proposed it, and  
24 if in fact you get into some discovery disputes over what the  
25 appropriate scope is, I think you can raise it at that time?

*Walter's Stamp, Inc.*

*Certified Card Transmitters*

*752-229-0191*

1 As I said, I don't necessarily disagree. I don't think we  
2 want to go to damages. And I don't think we want to go to  
3 state statute liability at this point. That will obviously be  
4 necessary at some point if there is some scientific evidence  
5 that asbestos fibers in Zonolite products do pose an  
6 unreasonable risk of harm. But I really want to limit this  
7 trial to that issue. That's number one.

8 Number two, the budget that I'm keeping your feet to  
9 the fire on probably isn't going to support much more than  
10 that anyway. So, I think maybe it would be a good idea to  
11 limit the scope to that issue.

12 MR. WESTBROOK: Yes. Your Honor, the language is not  
13 necessarily the problem, as long as we have an understanding  
14 that from our standpoint at least, what we're focusing on is  
15 the building and contamination of the building and whether if  
16 asbestos in a building is not from ZAI, is not innocuous,  
17 whether there's a cost to clean that up now or down the road.  
18 That's what we're concerned about, the contamination and  
19 whether something has to be done about it.

20 MR. BERNICK: That's the problem is that of course if  
21 you said about the -- what's it take to clean it up, it's  
22 always gonna cost something to clean it up. The question is  
23 whether it's necessary to clean it up. That's the question of  
24 liability and question of damages is a clean-up question,  
25 that's for later on.

*Walter's Cramp, Inc.*

*Certified Court Transcription*

*758-329-0191*

B7

1 THE COURT: All right. That I agree with. I don't  
2 think we want to go to the question of how much does it cost  
3 to clean it up, yet. I think what we want to go to is, is it  
4 necessary or even advisable to clean it up, and possibly, what  
5 are alternative methods, because that may also affect damages.  
6 But, for example, the Debtor may say that it can be  
7 encapsulated and your position may be no, the building has to  
8 be torn down. Somewhere in between may be a reasonable scope.  
9 I don't know. I don't know anything about this yet. I'm  
10 hoping you're going to inform me about it as we go on. So,  
11 these comments are not judging anything. I'm just  
12 hypothesizing that there could be a lot of things that come  
13 out at this trial, and I don't think it's necessary to get to  
14 the aspect of damages yet.

15 MR. WESTBROOK: Okay. That's fine, Your Honor. I  
16 think the language with that understanding, the language  
17 doesn't bother us, as long as it doesn't come back at some  
18 hearing in some limitation on what we're trying to discover.

19 THE COURT: Well, if it does, and you disagree with  
20 it, you'll file some motion and it'll get heard.

21 MR. WESTBROOK: Thank you, Your Honor.

22 THE COURT: All right. Can you live with the  
23 schedule that the Debtor has proposed now? This is -- fact  
24 discovery ends December 2, expert disclosure is January 2 by  
25 the ZAI claimants and by Grace January 31, depositions of EAI

*Writer's Cramp, Inc.*  
Certified Court Transcriptions  
778-329-0191



1 experts from February 3 to February 28, and of Grace's experts  
2 from March 3 to March 31. The Debtor will file a Rule 42  
3 consolidation motion by April 30. The claimants' response due  
4 May 26th. Debtors reply June 6. If you can live with those  
5 schedules, I'll tell you now when the argument will be.

6 MR. WESTBROOK: Your Honor, on the fact discovery,  
7 and again coming back to my point that fact discovery against  
8 Grace has been suspended for 14 months, we thought that fact  
9 discovery could go on and should go on -- I think at one  
10 hearing the Court said you wanted fact discovery to wind up by  
11 the end of the year. Well, Grace moved it back to December  
12 2nd. We had proposed February 28th. If we could move it at  
13 least until the end of January to give us a bit more time on  
14 fact discovery.

15 MR. BEENICK: Well the -- I'm sorry. The difficulty  
16 with that is that you then have fact discovery overlapping  
17 with the expert discovery. You know, I -- this all comes --  
18 this -- these dates, this sequence, the intervals, were  
19 specifically gone over in April and May and were satisfactory  
20 to the claimants at that point in time. And I can understand  
21 if there's a desire for a slippage of, you know, a week, or  
22 two or three or maybe even 30 days, but 60 days and then that  
23 screws up the expert sequence, I don't think is necessary.

24 THE COURT: Well, why don't I do this? It seems to  
25 me that I did say by the end of the year, so let's change fact

*Willet's Stamp, Inc.*  
Certified Court Transcripts  
732-229-0167

89

1 discovery to December 31. We'll make the ZAI claimants'  
2 experts reports due by January the 15, Grace's by January 31,  
3 and that keeps the rest of your schedule in place.

4 MR. WESTBROOK: That's fine.

5 MR. BERNICK: We can live with that, Your Honor.

6 THE COURT: All right. If that's the case,  
7 argument's going to be in Pittsburgh on June 30th and July 1st  
8 of 2003.

9 (Pause in proceedings)

10 MR. BERNICK: I think that that's all on that.

11 THE COURT: All right. One second.

12 (Pause in proceedings)

13 THE COURT: Okay.

14 MR. BERNICK: Okay. Actually, the last of the ZAI  
15 matters is the Motion for Leave to Appeal, which is Item 11.  
16 And maybe once we get done with that we'll be totally done  
17 with ZAI for today.

18 THE COURT: Well, actually, I think that Motion has  
19 to be heard by the District Court. Rule 8003 simply directs  
20 us to get responses in and transmit everything to the District  
21 Court. So, I've gotten response, the Debtor's the only one  
22 that filed everything — anything, so I'm now going to  
23 transmit it to the District Court and I think the District  
24 Court has to hear it.

25 MR. BERNICK: Okay.

*Walter's Cramp, Inc.*  
*Certified Court Transcribers*  
752-529-0191